**STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY**

**In the Matter of the Rehabilitation of:**

**SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION**

**Case No. 10 CV 1576**
**Hon. Richard G. Niess**

# REHABILITATOR'S OPPOSITION TO THE COFINA BONDHOLDERS' LETTER REQUEST FOR DISCOVERY

Dated: December 11, 2017.

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## INTRODUCTION

The COFINA Bondholders[1] request discovery in a letter to the Court dated December 1, 2017 from John Finnegan, their counsel (the "Letter"). The Letter represents, yet again, an attempt by a non-party policy beneficiary that to obtain discovery that fails to explain how the discovery request complies with *Nickel v. Wells Fargo, et al.* or why the discovery would not violate the statutory privilege in § 601.465. The Rehabilitator thus opposes the discovery and respectfully asks that the Court deny the COFINA Bondholders' Letter request.

## ARGUMENTS

### I. THE COURT OF APPEALS DECISION IN *NICKEL V. WELLS FARGO ET AL.* CONTROLS AND PRECLUDES THE REQUESTED DISCOVERY

The discovery request in the COFINA Bondholders' Letter seeks production of all iterations of the model used by the Rehabilitator or one or more of his advisors to prepare financial statements and projections for Ambac and the Segregated Account since January 1, 2016, "together with all inputs used in the model and all documents concerning the models findings and conclusions." (Letter, p.1) The COFINA Bondholders also seek authorization to conduct the deposition of Daniel J. Schwartzer, the Special Deputy Commissioner (the "SDC"), and Dennis McGettigan, whose Expert Report has been submitted to the Court in support of the Rehabilitator's Motion to Further Amend the Plan of Rehabilitation Confirmed on January 24, 2011 to Facilitate an Exit from Rehabilitation.

The Letter request is thus based on the mistaken premise that they are "parties" to this proceeding and that the rules of civil procedure apply. They are not parties, and therefore they are not entitled to discovery. The Court of Appeals made that clear in *Nickel v. Wells Fargo et.*

[1] We should begin by getting the terminology here right: the moving parties are not "General Account Stakeholders." They have suffered no insured losses and have no policy claims. They do not own Ambac policies in either the General or Segregated Accounts. They own bonds issued by an instrumentality of the Commonwealth of Puerto Rico, known as COFINA, that are insured by a single policy in the General Account. Hence, we refer to them as the COFINA Bondholders.

*al. a/k/a In re Ambac Assur. Corp.*, 2013 WI App 129, ¶108, 351 Wis. 2d 539, 841 N.W.2d 482 ("Nickel") ("The circuit court determined that the interested parties were not "parties" to this proceeding and denied their motions to intervene on that basis."). As the *Nickel* court held, "[b]ecause the interested parties are not parties within the meaning of the discovery statute, we conclude that the circuit court properly denied the interested parties' requests for discovery." That decision controls here.

Judge Johnston specifically explained in a prior proceeding that a rehabilitation proceeding is not adversarial litigation designed to adjudicate the diverse and divergent interests of each policyholder. It is a formal remedial measure to "rehabilitate the business of a domestic insurer." Wis. Stat. §645.32(1). Accordingly, the Rehabilitation is "a very flexible procedure" that is "regarded as a management rather than a legal task. . . . [The rehabilitator] must act under the supervision of the court, of course, but the court's control should be liberal, not strict, and should be provided without cumbersome procedures." Wis. Stat. Ann. §645.32 cmt. *See In the Matter of the Rehabilitation of: Segregated Account of Ambac Assur. Corp.*, No. 10 CV 1576, Order Denying Motions of Wells Fargo Bank and Certain LVM Bondholders and Emergency Motions To Postpone the July 9, 2010 Hearing on the Motions of Wells Fargo Bank and Certain LVM Bondholders, p.7 (July 16, 2010) (Johnston, J.); *see also Nickel*, 2013 WI App 129, ¶113 (confirming the same points).

If all interested parties could obtain discovery in a rehabilitation proceeding, this process would be hopelessly bogged down, becoming the "formal and cumbersome legal task" the Legislature sought to avoid. *Nickel*, 2013 WI App 129, ¶113. The COFINA Bondholders argue however that the Court cannot evaluate the conclusions the Rehabilitator has reached absent inspection of the model at issue, that disclosure of the model is required to provide the factual

foundation for the Exchange Transaction (citing Wis. Stat. § 909.015(9)), and that discovery will help streamline cross-examinations at the hearing in January, 2018. The COFINA Bondholders are not trying to streamline the Rehabilitation proceeding; they are trying to stall it and further rationalize their Motion to Adjourn. The COFINA Bondholders are not allowed to oppose the Rehabilitator's exit plan as though they are opposing a summary judgment motion; they are also not a "check" on the Rehabilitator as a regulator.

The COFINA Bondholders fail to explain how their discovery request, that will transform the management task of this Rehabilitation into adversarial litigation, can be reconciled with the intent of the Legislature, as expressed in Chapter 645 and confirmed by the Court of Appeals. That the COFINA Bondholders cannot reconcile their request for discovery with the Court's decision in *Nickel,* which puts them at odds with the Court's Order of January 20, 2017, that specifically stated that any discovery request must comply with *Nickel*. The Letter request clearly does not comply with the Court's orders and should thus be denied.

## II. THE REQUESTED INFORMATION IS PRIVILEGED AND THE COMMISSIONER DECLINES TO WAIVE THE PRIVILEGE.

A second and independent reason to deny the COFINA Bondholders' request for discovery is that the Commissioner has not consented, and will not consent, to producing the requested documents or serving up the SDC or its Expert for depositions. Pursuant to sections 601.465(lm)(a) and (2m)(a), the office of the Commissioner "may refuse to disclose…[t]estimony, reports, records and information that are obtained, produced, or created" in connection with the Commissioner's regulatory decision-making without the "written and specific consent of the Commissioner." The Commissioner reaffirms it is asserting the privilege. This Court recognized when this proceeding first began that the privilege in Chapter 601 protects the Commissioner from having to respond to discovery requests. *See In the Matter of the*

*Rehabilitation of: Segregated Account of Ambac Assur. Corp.*, No. 10 CV 1576, Findings of Fact & Conclusions of Law Regarding Motions of Certain RMBS Policyholders and Certain LVM Bondholders at 16, ¶8, (May 27, 2010) (Johnston, J.) ("As policyholders, Movants do not have standing as parties to seek discovery in this rehabilitation proceeding. Moreover, even if Movants were parties and there were a basis for them to seek discovery in this proceeding, documents relating to OCI's regulatory decision-making are statutory [sic] privileged under Wisconsin law. See Wis. Stat. §§601.465(1m)(a), (2m)(a).").

This Court again recognized the applicability of the privilege to discovery requests when it quashed the *subpoena duces tecum* served on the Commissioner by the Military Housing plaintiffs. *See* Transcript of Hearing Conducted On January 6, 2017, at 50-51 ("I do believe that the privilege that has been provided in § 601.465(b) [sic] does allow this Court to quash a subpoena if on its face the subpoena inquiries into areas that have--that deal with exclusively matters which are of the concern of the rehabilitation proceedings…."). In any event, the Commissioner has been clear with all parties: its files and the model it uses to assess the durability of an insurer are privileged. The COFINA Bondholders cannot reasonably claim there has been ambiguity on that point.

## III. THE COFINA BONDHOLDERS REQUEST FOR DISCOVERY MAKES FACTUAL MISSTATEMENTS THAT DEMONSTRATE THAT THE REQUEST MUST BE DENIED.

In addition to the *Nickel* Court's holding making discovery unavailable to non-parties and the privilege provided in Chapter 601, there is ample reason to deny the COFINA Bondholders' discovery based on the facts surrounding their request. The Letter asserts that "[t]he Rehabilitator has not disclosed whether the model is stochastic or deterministic, whether the model is simple or complex, [and] feature rich or basic." (Letter, pp. 1-2 (sic).) This is not true. In numerous public documents, including every annual statement, the Rehabilitator sets out four detailed

scenarios with losses and litigation recoveries described. The Gordian Group's model (which is proprietary and privileged) is clearly not stochastic; that is, the model does not have an element of inherent randomness. Moreover, inputs have been well-described, including in the annual reports, listening sessions in which the COFINA Bondholders participated and asked questions, and in subsequent meetings specifically with the COFINA Bondholders. There has been more than full disclosure and due process provided to all parties, including the COFINA Bondholders.

The COFINA Bondholders argue nonetheless that, with the Rehabilitator's model in hand, they could prepare alternative financial projections for the Court, thereby quantifying differences resulting from different inputs. (Letter, p.2.) But this Court is not obligated to consider alternative models; the Rehabilitator's Second Amended Plan is before the Court now and the regulator charged with overseeing the Segregated Account has applied the model and adjudged the results durable. In other words, the Rehabilitator's discretion is at issue, not a model that some third party like the COFINA Bondholders, with a clear bias, might manipulate or concoct. As Judge Johnston noted:

> "Wis. Stats. Sec. 645.32(1) was cited by this Court in its July 16th [2010] order for the principal that a rehabilitation proceeding is not an adversarial litigation which serves to adjudicate diverse and divergent interest of each policyholder. It is a formal remedial measure to "rehabilitate the business of a domestic insurer." Interests of movants yield to the policy decision and business decisions of the Rehabilitator who, by statute, is the public official that is best qualified to perform the rehabilitation/liquidation process. The reason for this is that the Rehabilitator has no special interests in the outcome except to administer the matter for the maximum benefit of all interested parties which the Rehabilitator has done in securing the temporary injunction in this matter."

*See* Decision on Motions Challenging the Legality of the Establishment of the Segregated Account; The Challenges to the Temporary Injunction Concerning the Exercise of Control Rights, Withholding of Premiums and Other Objections; and Motions to Formally Intervene as

Parties to this Rehabilitation Proceeding, dated October 26, 2010, p. 9.

Finally, the COFINA Bondholders tout the narrow nature of their requested discovery, but a request that seeks "all documents (including work papers and source data)" relating to the Rehabilitator's work for the past two years would cover many thousands of pages of documents, including 3,400 policies, documents relating to the multiple RMBS Litigations, and investment portfolio information, to name only a few implicated categories. This Court declined to allow this type of fishing expedition in connection with the Military Housing *subpoena duces tecum*. It should make the same ruling here, lest discovery overwhelm the purpose of the Rehabilitation.

**CONCLUSION**

For the foregoing reasons, the Rehabilitator respectfully requests that the Court deny the COFINA Bondholder's Letter request for discovery.

Dated at Milwaukee, Wisconsin this 11th day of December, 2017.

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*Electronically signed by John D. Finerty, Jr.*
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